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FEB 14 2006

CLERK, U.S. DISTRICT COURT  
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**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

**CHARLES ANTHONY ELLINGBERG,**

**Petitioner,**

**v.**

**Civil Action No. 3:05-CV-2005-L**

**DOUGLAS DRETKE, Director  
Texas Department of Criminal Justice,  
Correctional Institutions Division,**

**Respondent.**

**ORDER**

This is a habeas case brought under 28 U.S.C. § 2254. Pursuant to 28 U.S.C. § 636(b), and an order of the court in implementation thereof, this action was referred to the United States magistrate judge for proposed findings and recommendation. On January 26, 2006, the Findings and Recommendation of the United States Magistrate Judge ("Report") were filed. Petitioner filed Notice of Motion of Objection to Findings and Recommendation of the United States Magistrate Judge ("Objection") on February 13, 2006.

Petitioner was convicted of aggravated robbery and unlawful possession of body armor by a felon. He was sentenced to 45 years confinement on the first charge and 10 years confinement on the second charge. Both convictions and sentences were affirmed on direct appeal. Here, Petitioner contends that: (1) his conviction was obtained by evidence seized during an unconstitutional search and seizure; (2) the prosecutor knowingly presented false testimony at the trial; (3) the prosecutor failed to disclose evidence favorable to the defense; and (4) he received ineffective assistance of

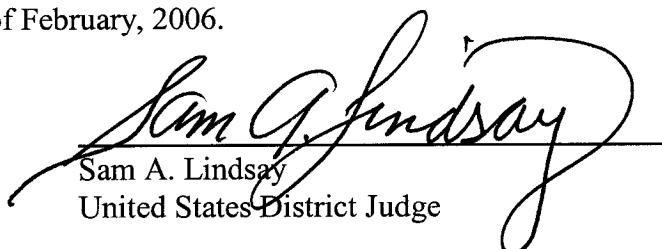
counsel because his trial attorney failed to call certain witnesses to testify, and failed to prevent admission of certain incriminating statement made by him.

The magistrate judge determined that Petitioner's request for habeas relief on his claim of unlawful search and seizure is barred as the state provided an opportunity for full and fair litigation on this Fourth Amendment claim. *See Stone v. Powell*, 428 U.S. 465, 493-95 (1976). Regarding Petitioner's claim that the prosecutor knowingly presented false testimony at the trial, the magistrate judge determined that there was no evidence to support this claim. The magistrate judge also determined that Petitioner failed to allege or prove that the prosecutor failed to disclose all evidence favorable to Petitioner that was material to either his guilt or punishment. Regarding Petitioner's claim of ineffective assistance of council, the magistrate judge considered the sworn affidavit of Petitioner's attorney that was filed with the state habeas court regarding the attorney's failure to call certain witnesses to testify. The magistrate judge also considered the findings of the state habeas court that Petitioner's trial attorney was trustworthy and the statements in his affidavit believable. The magistrate judge concluded that Petitioner failed to rebut by clear and convincing evidence the state habeas court's determination that the trial attorney presented a credible explanation for not calling certain witnesses. The magistrate judge also noted that the record shows that a hearing was held on the admissibility of Petitioner's incriminating statement. The magistrate judge therefore determined that Petitioner's claim of ineffective assistance of counsel should be overruled. The magistrate judge recommends that the court deny Petitioner's application for writ of habeas corpus.

Petitioner objects to the Report, contending that his petition for writ of habeas corpus should be granted. Petitioner reasserts his contentions regarding unlawful search and seizure, prosecutorial misconduct, and ineffective assistance of counsel.

After making an independent review of the pleadings, file and record in this case, and the findings of the magistrate judge, and having considered Petitioner's objection thereto, the court determines that the findings of the magistrate judge are correct. They are therefore accepted as those of the court. Accordingly, the court **overrules** Petitioner's Notice of Motion of Objection to Findings and Recommendation of the United States Magistrate Judge; **denies** Petitioner's petition for a writ of habeas corpus; and **dismisses this action with prejudice**.

It is so ordered this 14<sup>th</sup> day of February, 2006.



Sam A. Lindsay  
United States District Judge